IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>ARMANDO MONTER JACINTO,<br><br>Defendant and Respondent. | S164011<br><br>Court of Appeal<br>No. A117076<br><br>Sonoma County<br>Superior Court<br>No. SCR487837 |

# RESPONDENT'S OPENING BRIEF ON THE MERITS

After Decision by the Court of Appeal
First Appellate District, Division Five
Filed April 23, 2008



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# RESPONDENT'S OPENING BRIEF ON THE MERITS

## ISSUE PRESENTED

Whether a defendant's rights to compulsory process and due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution are violated when the county sheriff's department, having been served with a defense subpoena for an in-custody alien exculpatory witness, turns over the witness to federal immigration officials for deportation without prior notice to the superior court or the defense, thereby rendering the witness unavailable to testify? (Petn. for Review at p. 2.)

## INTRODUCTION

If the right to compulsory process is to mean anything, it must mean that the state must honor a validly issued subpoena. The turning over of a subpoenaed defense witness by sheriff's department employees to immigration officials for deportation without prior notice to the court or the defense violates the Compulsory Process and Due Process Clauses, as well as a defendant's right to present a defense, under the Fifth, Sixth and Fourteenth Amendments.

In this case, the trial court found that the defense established a constitutional violation under the materiality standard of *United States v. Valenzuela-Bernal* (1981) 458 U.S. 858. Based on the unquestioned materiality of the subpoenaed witness's testimony to the defense, the trial court determined that nothing short of dismissal was adequate to enforce appellant's constitutional rights.

In reversing the trial court's dismissal order, the Court of Appeal held that respondent failed to establish "state action" resulting in a violation of respondent's rights. (Opn. 1.) It also found that respondent "has not shown any knowledge of the materiality of the witness's testimony by the jailers or any member of the prosecution team." (Opn. 1.)

The Court of Appeal's opinion failed to properly evaluate the effect

of a validly issued subpoena on the sheriff department's obligation to notify the trial court and the defense of its intent to turn over the witness for deportation prior to the release of the witness to federal authorities. The notification to and release of a subpoenaed defense witness to federal Immigration and Custom Enforcement agents ("ICE") by the sheriff's department was state action which denied respondent his rights to compulsory process and due process of law. To the extent that the sheriff department's knowledge of the materiality of the witness to the defense is relevant to the determination of whether state action has occurred, the existence of the subpoena was sufficient to place the sheriff's department on notice of the witness's materiality. Respondent was denied his Fifth, Sixth and Fourteenth Amendment rights to compulsory process and due process of law, and the Court of Appeal's opinion must be reversed and the trial court's dismissal order reinstated.

## STATEMENT OF THE CASE

Respondent Armando Monter Jacinto was charged by information on June 13, 2006, with one count of attempted murder (Pen. Code, § 664/187), with related great bodily injury and personal use of a knife enhancements (Pen. Code, § 12022.7, 12022(b)(1)), and assault with a deadly weapon (Pen. Code, § 245), with a related great bodily injury enhancement. (CT 14.)[1]

On December 5, 2006, the defense alerted the court to its intent to file a motion to dismiss. (CT 81; RT 8.) The motion to dismiss was filed on December 12, 2006, and further pleadings on the motion were filed by both the prosecution and the defense. (CT 82, 126, 133.) On February 2, 2007, the court granted the motion. (CT 142.)

The prosecution filed a timely notice of appeal on March 13, 2007, pursuant to Penal Code section 1238, subdivisions (a)(1) & (8). (CT 143.)

On April 23, 2008, the Court of Appeal for the First Appellate District, Division Five, in a published opinion, reversed the order dismissing the information. (*People v. Jacinto* (2008) 162 Cal.App.4th 373.)

On July 30, 2008, this Court granted respondent's petition for

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[1] All record citations are to the appellate record in case A117076.

review.

## STATEMENT OF FACTS

### A. The Assault at the Restaurant

Eric Garcia testified that he was at Marisco's Mexican restaurant on the evening of May 2, 2006, with his friend, the victim Victor Retana. (CT 35.) Respondent Armando Jacinto was already at the restaurant with a woman, Michelle Maestas. (CT 28.) Garcia, Retana and Jacinto were each drinking beer. (CT 28, 29, 36.)

Garcia put $10 in the jukebox, but it was not working, turning on and off after it started playing a song. (CT 23.) After about 20-30 minutes, he and Retana decided to leave, and Garcia asked the owner of the restaurant to return the money he had put into the jukebox. (CT 23, 29.) The owner complied. (CT 23-24.) Jacinto was talking with the owner, and told the owner not to return the money. (CT 24, 27.)

Garcia walked out of the restaurant and then immediately turned around and looked back at Retana. (CT 31.) Retana was still inside the restaurant, standing at the doorway. (CT 31.) Jacinto, the woman, the owner, and another older man were standing near each other, also inside the restaurant. (CT 33.) An argument ensued and all four people were pushing Retana. (CT 31, 38.)

Garcia saw Jacinto move his hand and Retana jump back. (CT 34, 38.) Retana held his side and was bleeding. (CT 25.) Garcia heard Retana ask the owner if "he had seen what he had done." (CT 34-35.) Garcia asked Retana who had stabbed him, and Retana said that "it was the people that were there, who were drinking, on the table right beside them, and that he was the man sitting at that table." (CT 37.) Garcia identified Jacinto as the assailant. (CT 24.)

Garcia repeatedly stated that he did not see what happened well because of the pushing and (presumably) the direction people were facing. (CT 25, 35, 38.) He saw no knives or objects in anyone's hands. (CT 33-34.) Garcia did not hear anyone, including Jacinto, threaten Retana before the stabbing. (CT 34.) After the stabbing, he heard "the woman was saying that she hadn't done it." (CT 36.)

The victim told the police a different story of the night of the incident. He told a sheriff's department detective that he and Eric Garcia went to the restaurant together and were drinking beer, with Retana getting a little drunk. (CT 41, 48-49.) They were at the restaurant close to an hour, drinking beer and playing the jukebox. (CT 48-49.) Jacinto and whoever was with him were upset over the songs that they were playing on the jukebox. (CT 48.)

Retana then saw Garcia arguing with an older gentleman. (CT 51.) He did not know what the argument was about. (CT 51.) Jacinto intervened in the argument to help the older man, and he and Garcia began arguing, and then fighting. (CT 42, 52-53, 57.) Then two then went outside to continue fighting. (CT 57.) The older man was also outside, while the owner and the woman stayed inside. (CT 54.) Retana went outside to help Garcia, pulled Jacinto away, and he and Jacinto then got into a shoving match. (CT 59.) Jacinto then stabbed him. (CT 43.) He stated that no one else was involved, and that a woman did not do it. (CT 60.)

**B. Witness Nicolas Esparza's Statement**

Nicolas Esparza was interviewed on July 19, 2006, about the incident at the restaurant. (CT 87.)[2] He went to the restaurant with his boss, for whom he worked on various lunch trucks. (CT 88.) The men worked all afternoon cleaning the trucks, parking them in the back of the restaurant,

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[2]A written transcript of Esparza's audiotape statement was attached to the respondent's motion to dismiss. (CT 82.) The interview was conducted in Spanish, with the public defender's office preparing a written translation. (RT 35-36.) The prosecution questioned the accuracy of the written translation at the hearing on January 9, 2007, and obtained a copy of the audiotape of the interview at the close of that hearing. (RT 29, 72.) Defense counsel noted that after having reviewed the audiotape against the transcript, the prosecution had not raised any further objections to the transcript. (RT 81.) The written transcript will be referenced by its Clerk's Transcript pagination.

and getting them prepared for the next day. (CT 88.) They were inside the restaurant, in the back with two other lunch truck or restaurant workers, when a problem arose over the jukebox. (CT 88-89.) His boss went to help fix the jukebox, but later returned to the back of the restaurant. (CT 89.)

Esparza left the restaurant through a door located in the kitchen to take a cell phone call from his wife. (CT 90.) He saw a man and woman arguing outside of the restaurant. (CT 90.) The woman was dressed in blue shorts and a sky-blue colored blouse. (CT 92.) He had seen her earlier; she had been at the restaurant about an hour. (CT 95.) She had been sitting in the restaurant with two men, one of whom was respondent, Armando Monter Jacinto. (CT 95.)

Esparza stated that there were at least two men fighting, one of whom was with the woman. (CT 94.) There was also one other man present, for a total of four: the woman, the man that was stabbed, and two other men. (CT 94, 97.) An older man was not outside the restaurant, but Esparza later learned that he had been beaten up. (CT 94.)

The woman was upset and was struggling with her purse, with a man holding her by her left hand as if he wanted to take her away and she did not want to go. (CT 92, 98.) They were arguing, but Esparza could not hear what was being said. (CT 98.) He turned to talk on the phone, and when he

turned back he saw the man and woman holding hands, and then the woman hit the man with a blade. (CT 90.) She took a blade out of her purse, poked the man with her right hand, and blood spurted out. (CT 92-93, 98.)

Esparza never actually saw the blade. (CT 94.) But he was positive that a man did not do the stabbing, "It was just a woman towards a man." (CT 99.) He immediately then went to the back of the restaurant and told his boss that there was a problem. (CT 93.)

Esparza told his boss that there was a fight outside. (CT 91.) His boss told him and the others to leave. (CT 91, 92.) His boss told him and the others not to say anything, presumably to protect his business and because none of them were involved. (CT 93.) Esparza left on foot and did not return. (CT 91.) The other men stayed and spoke with the police, and had their names taken down. (CT 91, 93.)

Esparza stated that no one had paid or threatened him to come forward with his information. (CT 99, 100.) He believed that there were others who had seen what had happened but his boss had prohibited them from saying anything. (CT 100.) He knew that Jacinto was not guilty because he was "really drunk." (CT 100.) Esparza stated that he could state what happened, but that if he had not seen the incident he would not make up a statement ("offer myself to that") and risk getting himself into more

problems. (CT 101.) What he told the investigator was what he saw. (CT 102.)

### C. The Investigator's Service of the Subpoenas on the Sheriff's Department and Esparza

Public defender's office investigator Carlos Escobedo testified under oath at the hearing on the motion to dismiss. (RT 34.) Escobedo stated that he had received an email upon returning from vacation in early July, 2006, regarding a possible witness to the incident. (RT 37.) The information regarding the witness came from either the defendant or the defendant's family, and made its way to the public defender's office. (RT 48-49.) Escobedo went to the Sonoma County jail to talk to the witness in order to determine if he was a lead worth pursuing. (RT 51.) During that initial conversation, the witness, Nicolas Esparza, stated that the woman had done the stabbing. (RT 41.) Escobedo then realized that Esparza was an important witness for the defense, and returned two weeks later to tape record an interview so that there would no question as to his accuracy as to Esparza's statement. (RT 51, 53.) The tape recorded interview took place at the North County Detention Facility on July 19, 2006. (RT 35.)

Prior to the first interview, Escobedo checked to determine if Esparza was represented by counsel to determine if he had to notify counsel of the interview. (RT 38.) He discovered that Esparza has been convicted

of either battery (Pen. Code, § 243) or corporal injury on a spouse or cohabitant (Pen. Code, § 273.5). (RT 38-39.) Following that discovery, he did not investigate whether Esparza had counsel, because it was his understanding that he was permitted to interview a person if the person had been already been convicted. (RT 39.) He did not know that the public defender's office had represented Esparza. (RT 38.)

Escobedo served a subpoena for Esparza on the county jail on October 6, 2006. (RT 44-45; see also CT 104.) After discussing the importance of the witness with his supervisor, his supervisor told him to serve Esparza personally as well. (RT 45.) Escobedo then went back to the county jail on October 16, 2006, and served Esparza personally. (RT 44; see also CT 105.)

Before Esparza was brought out on October 16, 2006, a sheriff's department employee at the county jail, Rita, looked on her computer and told Escobedo that the computer had Esparza listed as a witness in its database. (RT 44, 65; see also CT 106.) She said that her database showed he was a subpoenaed witness. (RT 65.) Rita mentioned that she believed Esparza was going to be deported. (RT 45.)

Escobedo did not believe he spoke with Esparza about Esparza's status as an illegal alien, but knew that he was in this country illegally. (RT

43-44.) He served Esparza with a subpoena on October 16, 2006, and Esparza mentioned that he thought he was going to be deported. (RT 44.) He and defense counsel discussed generally Esparza's belief that he might be deported, and wondered whether that was true, but knew that the county jail had him listed as a subpoenaed witness in the case. (RT 56.) Escobedo learned a couple of days later that Esparza has been deported, and contacted ICE deportation agent Ken Cepeda Todd, who confirmed that Esparza has been deported on October 18, 2006. (RT 46-48, 65.) Since that time, Escobedo had checked his computer in order to see if Esparza was back in custody. (RT 47-48.) The computer said he was not in custody, and so Escobedo assumed he had been deported. (RT 47-48.) He made no other attempts to locate Esparza. (RT 47.)

The only person that Escobedo had interviewed who actually saw the stabbing was Esparza. (RT 58.) No witness that Escobedo had interviewed, other than Esparza, said that they saw a woman stab the victim in this case. (RT 51, 64.) At least one other witness was suspicious of the woman, but no one other than Esparza specifically said she did it. (RT 57.)

**D. The Trial Court's Dismissal**

At the conclusion of the hearing on January 9, 2007, the court found that the transcript of Esparza's statement demonstrated that his testimony

was material, not cumulative, and favorable to the defense. (RT 66.) The court noted that Esparza was the only person of whom either party was aware that said that a woman had committed the stabbing, and thus Esparza's testimony was exculpatory if believed. (RT 66.) The court also found that the sheriff's department knew Esparza was under subpoena. (RT 67-68.) The court declined to rule on the motion at that time, and instead gave the prosecution additional time to locate Esparza. (RT 68.)

On January 31, 2007, following the submission of further points and authorities by the prosecution and a reply by the defense (see CT 126, 133), the prosecution asked the court to deny the motion based on the failure of the defense to show bad faith on the part of the prosecution. (RT 74.) The prosecution argued that the county jail authorities were not an "arm of the government," and were not an investigatory agency or part of the "investigatory team" with a duty to report to the prosecutor. (RT 74, 82-83.) Under the prosecution's view, the county jail had no authority not to turn over the witness upon demand to the federal authorities. (RT 75, 76.)

The court expressly disagreed with the prosecution over the county jail's obligation to honor the defense subpoena. The court found that the county jail had jurisdiction over the witness while he was in its custody, and that there had been no federal court order for the witness's removal. (RT

75.) The court found that the witness was under a subpoena that had been accepted by the jail, that the jail's computer listed him as having been subpoenaed, that he was to remain here pending an order of the superior court, and that the federal government could not simply ignore the subpoena. (RT 76.)

The defense responded that under the cases of *People v. Valencia* (1990) 218 Cal.App.3d 808 and *United States v. Valenzuela-Bernal* (1981) 458 U.S. 858, bad faith need not be shown to establish the constitutional violation. (RT 79-80, 83.) Defense counsel also noted that unlike the case law cited in the prosecution's opposition, in this case a valid subpoena had been issued for Esparza, thus calling into play Mr. Jacinto's right to compulsory process under the Sixth Amendment. (RT 80-81.)

The court found that bad faith on the part of the prosecution was not required to establish the constitutional violation. (RT 83-84.) It permitted the prosecution a continuance to determine if it could locate Esparza. (RT 86.) On February 2, 2007, after the defense announced it was not ready to proceed to trial because of the deportation of the witness, and the prosecution indicated there was no reasonable likelihood of its locating Esparza, the court granted the defense motion to dismiss. (RT 88-89.)

## ARGUMENT

### RESPONDENT DEMONSTRATED A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND COMPULSORY PROCESS WHERE THE SHERIFF'S DEPARTMENT TURNED OVER A SUBPOENAED DEFENSE WITNESS TO IMMIGRATION AUTHORITIES FOR DEPORTATION WITHOUT PRIOR NOTICE TO THE COURT OR THE DEFENSE

### A. The Sheriff Department's Notification to and Release of the Witness to ICE Officials Constituted State Action

"[P]rivate action, however, hurtful, is not unconstitutional." (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 358; *Civil Rights Cases* (1883) 109 U.S. 3, 11.) The only action prohibited by the due process clause is "such action as may fairly be said to be that of the States. [The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (*Kruger*, *supra*, at p. 359, quoting *Shelley v. Kraemer* (1948) 334 U.S. 1, 13.)

The guarantees of the Sixth Amendment are applicable to the States via the Fourteenth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *Washington v. Texas* (1967) 388 U.S. 14, 19 [finding the right to compulsory process is a fundamental element of due process of law].) At its core, the Sixth Amendment "concerns the confrontation between the State and the individual." (*Michigan v. Jackson* (1986) 475 U.S. 625, 634.)

A sheriff's department is a state actor, acting under color of state

authority, when it exercises control over county jail inmates and detainees. State law provides that "the sheriff shall take charge of and . . . keep the county jail and the prisoners in it." (Gov. Code, § 26605.) Pursuant to Penal Code section 4000,[3] county sheriffs are charged with the keeping of the common jails for purposes including "the detention of persons committed in order to secure their attendance as witnesses in criminal cases" (§ 4000, subd. (1)), and "the confinement of persons sentenced to imprisonment therein upon a conviction for crime" (§ 4000, subd. (4)).

"The sheriff is both a ministerial officer of the court for the purpose of keeping defendant until service of sentence begins [citations] and also the executive officer who executes the jail sentence [citation]." (*People v. Thomas* (1959) 52 Cal.2d 521, 531-532.) The sheriff department's actions in this case of notifying the ICE of the possible illegal status of the witness/prisoner, and turning him over to ICE officials following the completion of his county jail sentence, resulted in the loss and unavailability of the witness for trial. The sheriff department's actions can "fairly be said to be that of the [state]." (*Shelley v. Kraemer*, *supra*, 334 U.S. at p. 13.)

Both federal and California authority confirm that sheriffs are state

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[3] All future statutory references are to the Penal Code, unless otherwise indicated.

actors. Sheriffs performing law enforcement duties have been deemed state actors for purposes of federal civil rights liability under section 1983. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 839.) Sheriffs are deemed state actors performing state action when setting policies concerning the release of persons from the county jails. (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1174.) The involvement of local sheriffs establishes the state action essential to a violation of a petitioner's Fourteenth Amendment rights, whether or not the actions of the officers were officially authorized or lawful. (*Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144, 152; see also *Lugar v. Edmondson Oil Co.* (1983) 457 U.S. 922 [private party's joint participation with state officials in seizure of disputed property sufficient to characterize party as state actor for purposes of 14th Amend.].)

A finding of state action is compelled by the fact that the sheriff's department was under no compulsion to take the affirmative act of notifying ICE officials regarding the possible illegal status of the witness. There was no affirmative obligation on the part of the county sheriff's office to notify the ICE of the witness's immigration status. (See 84 Ops.Cal.Atty.Gen. 189 (2001); 67 Ops.Cal.Atty.Gen. 331 (1984); *League of United Latin American Citizens v. Wilson* (C.D.Cal.1995) 908 F.Supp. 755, 786-787 (*LULAC I*);

*League of United Latin American Citizens v. Wilson* (C.D.Cal.1997) 997 F.Supp. 1244, 1261 (*LULAC II*); Brady et al., Cal. Crim. Law and Immigration (The Immigrant Legal Resource Center 2002) State Enforcement of Immigration Law, Immigration Holds and Detainers, and Detention of Juvenile Aliens, chapter 12, §§ 12.1–12.3.) The county jail's actions in "[referring] to INS for review" at the time of booking (Req. for Judicial Notice, Ex. C., p. 2), and turning over the witness to ICE officials at the end of his county jail term were unquestionably affirmative acts resulting in the loss of the witness. The sheriff department's acts constituted state action.

This case is unlike the situation where a prisoner completes his county jail term, is released from custody, and then makes himself unavailable to testify. (See *In re Jesus B.* (1977) 75 Cal.App.3d 444, 450; see also *United States v. Lomeli-Garnica* (9th Cir. 1974) 495 F.2d 313 [no due process violation where witness released and voluntarily chose to return to Mexico].) In that instance, the loss of the witness cannot fairly be said to be the result of the sheriff department's action, but instead is the result of the witness's refusal to honor the subpoena.[4] Here, the sheriff department's

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[4]Note that in this case, the defense served the subpoena on the sheriff's department, which logged it into its computerized data base, and also personally served the witness once it learned that he might be subject to

action in notifying ICE was done under color of state authority and resulted in the loss of the witness via deportation proceedings, even though the sheriffs department was under no obligation to notify the ICE of the witness's status as a possible illegal alien. In *Abbott v. Cooper* (1933) 218 Cal. 425, a deputy sheriff's action of wrongfully confining a person was deemed an act "colore officii,"[5] resulting in the sheriff's liability for false imprisonment. The sheriff department's acts here were taken under color of state authority, even though not legally required, and thus "may fairly be said to be that of the [state]" (*Shelley v. Kraemer, supra*, 334 U.S. at p. 13.) The sheriff department's decision to voluntarily communicate and cooperate with federal immigration officials does not justify the Court of Appeal's finding of no state action. (See Opn. 5-6.)

The Court of Appeal incorrectly stated that *Valenzuela-Bernal* found "an absence of state action in circumstances where the federal executive branch was both jailer and actor assessing the materiality of the deported witnesses' prospective testimony," based on the federal executive branch's obligation to execute federal immigration policy. (Opn. 6-7, relying on

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deportation. (RT 44, 65.)

[5] "Colore officii" – By color of office. Officer's acts unauthorized by officer's position, though done in form that purports that acts are done by reason of official duty and by virtue of office. (See Black's Law Dict (5th ed. 1979) p. 241, col. 1.)

*Valenzuela-Bernal*, *supra*, 458 U.S. at p. 872.) But *Valenzuela-Bernal* states no such finding. The Court did not question that the deportation of illegal alien witnesses constituted state action. The Court found only that "the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." (*Valenzuela-Bernal*, *supra*, 458 U.S. at p. 872.)

The Court held that the "mere fact" of deportation was not sufficient to establish a violation of the Compulsory Process or Due Process Clauses of the Sixth and Fifth Amendments; the defendant also had to demonstrate the materiality of the deported witness in order to establish a constitutional violation. (*Id.* at pp. 872-873.) The materiality test speaks to whether a defendant can demonstrate the importance of the witness to the defense, not whether state action has occurred. (*Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 872-874.) The Court rejected the defendant's claim based on his inability to demonstrate the materiality of the deported witness, not on the absence of state action. (*Id.* at p. 874.)

The Court of Appeal's holding of no state action confuses the inquiry by conflating the determination of materiality with the concept of

state action. State action concerns whether the disputed act "may fairly be said to be that of the [state]." (*Shelley v. Kraemer*, *supra*, 334 U.S. at p. 13.) Materiality of the witness concerns whether the defendant will be able to demonstrate prejudice so as to establish a constitutional violation resulting from that act. (See *Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 867-871 [discussing requirement of prejudice/materiality for various Sixth Amendment violations].) "The mere fact that the Government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense." (*Id.* at pp. 872-873.)

Determining whether a constitutional violation has occurred based on the materiality of the deported witness is an entirely different inquiry from whether state action has taken place. *People v. Mejia* (1976) 57 Cal.App.3d 574, 581-582, rejected the prosecution's claim of no state action where the witnesses were deported by the federal government, and not the state, finding that "cooperation involves participation, and participation generally results in responsibility." (See also *People v. Jenkins* (1987) 190 Cal.App.3d 200, 204 [local law enforcement's delivery of illegal aliens to

federal authorities without prior notice to defense and without making arrangements to prevent or delay deportation equals state action under *Meija*]; *People v. Cordova* (1983) 148 Cal.App.3d 177, 186 [dismissal of charges and turning over of material witnesses to immigration authorities was the "efficient cause" of witnesses' unavailability].) The decisions in *Meija*, *Valenzuela-Bernal*, et. al have rested on the ability of the defense to show the materiality of the witnesses, not on whether state action has occurred. (*People v. Meija*, *supra*, 57 Cal.App.3d at pp. 579-581; *Valenzuela-Bernal*, *supra*, 458 U.S. at p. 874.)

The Court of Appeal was correct that this case "presents a significantly different factual predicate" from *Valenzuela-Bernal* and other cases in which alien witnesses were deported following their arrest by either state or federal authorities. Unlike other cases, where the alien witnesses were co-defendants, victims or witnesses arrested along with the defendant and subsequently turned over to federal officials for deportation (see *Meija*, *Cordova*, *Valenzuela-Bernal*), here the witness was discovered by the defense and subpoenaed to testify, but had not yet been disclosed to the prosecution given the pre-trial status of the case. (CT 76.)[6] The Court of

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[6]Note that the witness was deported on October 18, 2006 (Req. for Judicial Notice, Ex. D), but the prosecution was not ordered to turn over its witness list until November 20, 2006 (CT 77), nor ordered to supply

Appeal found that the sheriff's department "was no more than the custodian of witness Esparza," "was not part of the prosecutorial investigative team" and therefore its action in turning over the witness to ICE officials "may not be attributed to the prosecution." (Opn. 6.)

The Court of Appeal's conclusion is directly contrary to authority. The prosecution, regardless of whether the an individual prosecutor acts in good or bad faith, ultimately bears responsibility for the failure to disclose known, material evidence. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.) "[S]ixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual." (*Michigan v. Jackson* (1986) 475 U.S. 625, 634.) The prosecution's disclosure obligation exists not to insure the good faith of the prosecution, but to insure the accuracy and fairness of trials by requiring adversarial testing of all available evidence bearing on guilt or innocence. (*Carriger v.*

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discovery until October 26, 2006 (CT 76). The defense, which had previously asserted its speedy trial rights, waived time until October 25, 2006, plus 60 days because of the failure of the district attorney's office to make a percipient witness (Michelle Maestas) available and to turn over forensic reports from the Department of Justice. (CT 67, 69, 75.) The defense had not been ordered to turn over its witness list, and no *in limine* motions had been filed by either party at the time the defense alerted the court to its intent to file a motion to dismiss based on the witness's deportation. (CT 81; RT 12-5-06.)

*Stewart* (9th Cir. 1997) 132 F.3d 463, 480.)

It is true that the *Barrett* Court found that the prosecution could not be made to provide discovery of Department of Corrections (CDC) materials concerning the general operation of a prison based on its finding that the CDC was not part of "the prosecution team" for purposes of its administrative and security responsibilities in housing convicted felons. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1317-1318; Opn. 6.; but see *Carriger v. Stewart*, *supra*, 132 F.3d at p. 480 [prosecution's *Brady* duties extend to witnesses' prison files].) But *Barrett's* finding that the prosecution's statutory discovery obligations did not include such general materials did not place those files outside the reach of the defendant's constitutional right to present a defense. The court found that the defendant had a right to discovery of the CDC records by subpoena duces tecum upon a showing of good cause. (*Id.* at p. 1318.) *Barrett* did not find that prison or county jail officials' actions could not be attributed to the prosecution (Opn. 6), it merely found that the prosecution did not bear the burden of producing discovery materials not directly related to the investigation of the underlying offense. (*Id.* at pp. 1317-1318.)

Although the sheriff's department in this case played no role in the investigation or prosecution of respondent, it was instead fulfilling its

statutory mandate as the custodian of the witness as he served his county jail sentence. Section 4000 contemplates that sheriff departments shall maintain custody and control over both detainees held to testify, as well as convicted prisoners. (§ 4000, subd. (1) & (4).) Government Code section 26605 charges sheriffs with keeping the county jails and the prisoners within it. The sheriff department's act of notifying and turning over the witness to ICE officials was done under color of state authority, even if the department was not serving in an investigative or "prosecutorial team" capacity. The loss of the witness was the direct result of the sheriff department's actions, and therefore the loss was the direct result of state action. The denial of respondent's rights to compulsory and due process are subject to redress.

**B. To the Extent Knowledge of the Witness's Materiality Bears on Whether State Action has Occurred, The Subpoena Served on the Sheriff's Department was Sufficient to Place it on Notice of the Witness's Materiality and Supports a Finding of State Action**

The critical difference between this case and all of the state and federal cases dealing with the deportation of alien witnesses is the service of the defense subpoena on the sheriff's department and on the witness himself. Respondent has found no cases which have addressed a *Valenzuela-Bernal* claim in the context of a subpoenaed witness. The issuance of the subpoena in this case is critical to the analysis because the

subpoena put the sheriff's department, and thus the state, on notice that the witness was a material witness for the defense. Respondent does not contend that due process and compulsory process prevent a sheriff's department from turning over a prisoner to federal authorities for deportation. Respondent does contend that when a defendant puts the sheriff's department on notice of the need for that prisoner to testify via the issuance of a subpoena, and the sheriff's department confirms receipt and entry of the subpoena in its database, due process and compulsory process require the department to notify the defense or the court prior to the actual transfer of the witness so that the defense can utilize available mechanisms for insuring that witness's presence or preserving his testimony for trial.

"The process by which the attendance of a witness before a court or magistrate is required is a subpoena." (Pen. Code, § 1326.) Service of a subpoena is the preferred method for obtaining a witness's attendance at trial. (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1074.) A subpoena is an order to a witness to appear, and failure to comply is punishable by the court as contempt. (Pen. Code, § 1331; *People v. Garcia* (2008) 160 Cal.App.4th 124, 131, fn. 2.)

Section 1326 is not limited to non-incarcerated witnesses. (*People v. Garcia*, *supra*, 160 Cal.App.4th at p. 131.) Section 4004 provides for the

removal and transport of a county jail prisoner to court, and contemplates such removal by either "legal order or process." A subpoena for a minor witness may be served on the minor's parent, guardian, conservator, or other fiduciary, with the person being served incurring the obligation to produce the minor or be subject to contempt. (Pen. Code, § 1328, subd. (b)(1).) Similarly, a subpoena served on the sheriff's department, notifying them of the demand for an in-custody witness, is sufficient to obligate the sheriff's department, as the custodian, to produce that witness. Such obligation is contemplated by sections 1326 and 4004, and the sheriff's department is not free to ignore the subpoena while it takes actions resulting in the loss of the witness from state custody.

The right to compel a witness to testify is a fundamental right pursuant to the Compulsory Process Clause, and as such takes precedence over the enforcement of the immigration laws. (*Washington v. Texas*, *supra*, 388 U.S. at p. 19; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) Had sheriff's department officials alerted the court or the defense, as the issuer of the subpoena, of the witness's pending release and transfer to federal authorities, steps could have been taken to secure his presence at trial. The material witness statutes exist for just such a purpose. (See Pen. Code, §§ 1332, 878-883; *In re Francisco M.*, *supra*, 86 Cal.App.4th at p. 1064.) The

witness could have been detained under a court order pursuant to Penal Code section 1332. Alternatively, the defense could have preserved his testimony via a conditional examination. (See Pen. Code, § 1335, et. seq.) Federal statutes make express provision for the retention of alien witnesses prior to their deportation. (See 8 C.F.R. § 215.2(a), 215.3(g); 18 U.S.C. §§ 3144, 3149; *Torres-Ruiz v. United States District Court* (9th Cir. 1997) 120 F.3d 933, 934-935; see also *United States v. Lujan-Castro* (9th Cir. 1979) 602 F.2d 877, 878 [right to retain alien witnesses previously established by *United States v. Mendez-Rodriguez* (9th Cir. 1971) 450 F.2d 1]. )

The Court of Appeal's finding that respondent's remedy in this situation was to enlist the aid of the District Attorney's office in securing the presence of the witness rings hollow when the defense was left unaware of the need to seek prosecutorial or trial court assistance because of the lack of communication by the sheriff's department. (See Opn. 7.) The case was still in pre-trial status, with the prosecution not being ordered to turn over its witness list until a full month after the witness's deportation. (See Req. for Judicial Notice, Ex. C, pg. 3 [witness turned over to ICE on 10-17-06]; CT 76 [on 10-25-06 court orders prosecution to supply discovery by 10-26-06]; CT 77 [on 11-17-06 court orders prosecution to supply its witness list by 11-20-06].) No orders had been issued to the defense to turn over

discovery or its witness list by December 5, 2006, the date on which the defense alerted the court to its intent to file a motion to dismiss. (CT 81.)

The defense was not at fault in failing to enlist the aid of the District Attorney's office when it was not aware of the need for that office's assistance. While the defense had been informed that the witness was subject to deportation, there is no basis on which to believe the defense would not have readily sought the assistance of the District Attorney's office in securing the presence of an exonerating witness had it been aware of the witness's imminent transfer to ICE authorities. The defense utilized the proper and preferred procedure of issuing a subpoena, and justifiably relied on that service to secure the witness's presence.

This is not a situation where the state had no reason to know of the exculpatory value of the witness. Here, the defense did all that it could reasonably be expected to do by putting the state on notice of the witness's materiality through the issuance of the subpoena and its service on the sheriff's department and the witness himself. The issuance of the subpoena was the proper procedural mechanism for securing the witness's attendance at trial. The fact that the sheriff's department confirmed to the defense investigator that its computer database listed the witness as being under subpoena implied that it would comply with the subpoena and make the

witness available for trial. The defense had every reason to believe the sheriff's department would notify the defense or the court before taking any action which would remove the witness from the court's jurisdiction. Sheriff's department officials released the witness to ICE authorities, however, without prior notice to the court or the defense, after they had been placed on notice of the witness's materiality via the subpoena.

While there is no due process violation where the prosecution "take [such] steps as appear reasonably calculated under the circumstances to assure [the material witness's] presence" (*In re Jesus B.* (1977) 75 Cal.App.3d 444, 450), the converse is also true: the state cannot sit back and do nothing in the face of a validly issued subpoena for an in-custody witness and then claim that it had no role in the denial of the defendant's compulsory and due process rights. "[P]rocedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." (*Giglio v. United States* (1972) 405 U.S. 150, 154.)

The Court of Appeal concluded that it would be "unreasonable to impose a duty on the jailers to make an inquiry into the materiality of the testimony a witness may offer every time jail personnel are served with a subpoena requiring a deportable witness to appear at trial." (Opn. 7-8.) The

Court of Appeal's opinion ignores the overarching protection of the Compulsory Process Clause, a protection that was called into play via the issuance of the subpoena. Compulsory process gives criminal defendants "the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 56.) "A judicial system with power to compel attendance of witnesses is essential to effective protection of the inalienable rights guaranteed by [article I, section I of the California Constitution]." (*Vannier v. Superior Court* (1982) 32 Cal.3d 163, 171.)

At a minimum, it was incumbent on the sheriff's department to alert the defense or the trial court of its intent to turn over the witness to ICE officials before releasing the witness to federal custody. Failure to do so is directly attributable to the prosecution, regardless of whether the District Attorney's office had actual notice of the witness's existence and materiality to the defense. The prosecution, regardless of whether an individual prosecutor acts in good or bad faith, or as part of its "normal practice" (Opn. 8), ultimately bears responsibility for the failure to disclose known, material evidence. (*Kyles v. Whitley, supra*, 514 U.S. at pp. 437-438.) The service of the subpoena on county jail officials gave notice of the

witness's materiality to the prosecution. The prosecution is ultimately responsible for the loss of the witness here.

Finally, the Court of Appeal's focus on whether sheriff's department personnel had knowledge of the materiality of the witness's testimony is misplaced. (See Opn. 7-8.) The *Valenzuela-Bernal* test of materiality provides the defense with the opportunity to establish a constitutional violation based on "a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." (*Valenzuela-Bernal*, *supra*, 458 U.S. at p. 873.) Sanctions are warranted for deportation of alien witnesses "if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." (*Id.* at pp. 873-874.) The burden of establishing the witness's materiality is placed on the defense, and if it can be established, then a constitutional violation has occurred. (*Id.* at p. 871-872.)[7]

Knowledge of the witness's materiality on the part of the state is not

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[7]"We thus conclude that the respondent can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses." (*Id.* at p. 871.) "Such an absence of fairness is not made out by the Government's deportation of the witnesses in this case unless there is some explanation of how their testimony would have been favorable and material." (*Id.* at p. 872.)

required. Indeed, if the defense were required to show that the state had knowledge of the witness's materiality when it deported him or her, there would be no need for the *Valenzuela-Bernal* test. If the state knowingly deports a favorable defense witness, that would be a *Brady* violation. (*Brady v. Maryland* (1963) 373 U.S. 83; see also *United States v. Bagley* (1985) 473 U.S. 667, 683 [regardless of request, constitutional error for government to suppress favorable evidence where reasonable probability that had evidence been disclosed, result of the proceeding would have been different].) *Valenzuela-Bernal* assumed the government acted in good faith when it deported alien witnesses following the conclusion of an Assistant United States Attorney that they possessed no material evidence to either the prosecution or the defense. (*Valenzuela-Bernal*, *supra*, 458 U.S. at p. 861.) The *Valenzuela-Bernal* test does not require the state to have been aware of the deported witness's materiality, it requires the defense to establish that materiality following the alien witness's deportation.

The Court of Appeal misunderstood the relevant inquiry. The prosecution's knowledge of the witness's materiality to the defense was not required in order to establish either state action or a constitutional violation. To the extent knowledge of the witness's materiality is required, service of the subpoena on the sheriff's department and the department's confirmation

that the subpoena had been logged into its computerized database was sufficient to place the department on notice of the witness's materiality. State action resulted in the loss of the deported witness, and respondent must be permitted to demonstrate a constitutional violation under the applicable *Valenzuela-Bernal* test.

### C. *Valenzuela-Bernal* is the Controlling Law Where the Defense Moves to Dismiss Based on the Deportation of Favorable Defense Witnesses Prior to Trial

Should this Court agree that state action resulted in the loss of the subpoenaed witness, this Court must then determine whether the Court of Appeal's reversal must itself be reversed, and the trial court's ruling dismissing the underlying prosecution reinstated. The prosecution below, and in the Court of Appeal, advanced the theory that the *Valenzuela-Bernal* test for materiality was no longer good law, and instead that a defendant must demonstrate both materiality and bad faith on the part of the state in deporting the alien witness. (See CT 126; RT 74.) The trial court rejected that theory, and instead dismissed the case after finding that the defense had met the applicable *Valenzuela-Bernal* test. (RT 83-84, 88-89.) Respondent offers the following argument as to why the *Valenzuela-Bernal* test remains good law. The trial court's dismissal order should be reinstated.

The Sixth Amendment to the United States Constitution guarantees a

criminal defendant the right to "compulsory process for obtaining witnesses in his favor." This right has been recognized as fundamental:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

(*Washington v. Texas*, *supra*, 388 U.S. at p. 19; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 ["Few rights are more fundamental than that of an accused to present witnesses in his own defense"]; *Faretta v. California* (1975) 422 U.S. 806, 818 ["The rights to notice, confrontation, and compulsory process [are] basic to our adversary system of criminal justice"]; *People v. Ortiz* (1990) 51 Cal.3d 975, 982 ["The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights"].) "The right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." (*Washington v. Texas*, supra, 388 U.S. at pp. 17-18.)

In *Valenzuela-Bernal*, the Court considered the appropriate test for

determining whether the deportation of illegal alien witnesses violates a criminal defendant's rights to compulsory process under the Sixth Amendment, and due process of law under the Fifth Amendment. In *Valenzuela-Bernal*, the defendant, himself an illegal alien, was stopped after a high-speed chase near a Border Patrol checkpoint. The defendant and his five passengers fled on foot, but he and three of the passengers were eventually caught. The prosecution determined that the passengers possessed no evidence material to the prosecution or the defense, and had two of them deported. A third passenger was detained to provide evidence that the defendant had transported an illegal alien in violation of federal law. (*Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 860-861.)

The Court found that a defendant "must at least make some plausible showing of how [a deported witness's] testimony would have been both material and favorable to his defense" in order to establish a violation of the right to compulsory process. (*United States v. Valenzuela-Bernal, supra*, at p. 867.) Other cases concerning "what might loosely be called the area of constitutionally guaranteed access to evidence" supported the Court's imposition of a materiality requirement. (*Id.* at pp. 867-871.) A defendant "can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the

testimony of the deported witnesses." (*Id.* at p. 871.) The Court also held that "the same materiality requirement obtains with respect to a [Fifth Amendment] due process claim." (*Id.* at p. 872.)

The Court was mindful of the difficulty a defendant would have in establishing materiality where the eyewitnesses have been deported prior to being interviewed by the defense. (*United States v. Valenzuela-Bernal, supra*, at p. 873.) But it found that a defendant could "advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense." (*Ibid.*) Because such a proffer is "testimonial in nature and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney." (*Ibid.*) Because the defendant in *Valenzuela-Bernal* "made no effort to explain what material, favorable evidence the departed passengers would have provided for his defense," the Court found he had failed to establish a constitutional violation and reversed. (*Id.* at p. 874.) The Court ruled that for other cases, sanctions for the deportation of alien witnesses are warranted where there is a reasonable likelihood their testimony could have affected the judgment of

the fact-finder. (*Id.* at pp. 873-874.)

### D. Respondent Satisfied the *Valenzuela-Bernal* Test for Materiality and Was Thus Entitled to Sanctions for the Deportation of its Subpoenaed Witness

Pursuant to *Valenzuela-Bernal*, a defendant must make "some plausible explanation of the assistance he would have received from the testimony of the deported witnesses" in order to establish a constitutional violation. (*United States v. Valenzuela-Bernal, supra*, 458 U.S. at p. 871.) In order to establish the materiality of the deported witness's testimony, the Court found that a defendant could "advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense." (*Id.* at p. 873.) Because such a proffer is "testimonial in nature and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney." (*Ibid.*) Sanctions for the deportation of alien witnesses are warranted where there is a reasonable likelihood their testimony could have affected the judgment of the fact-finder. (*Id.* at pp. 873-874.)

The parties below did not contest the trial court's finding that the

transcript of the witness's statement to the defense investigator demonstrated that his testimony was material, not cumulative, and favorable to the defense. (See RT 66.) As found by the trial court, the witness's statement that the woman stabbed the victim would be exculpatory if believed by a jury. (RT 66; see also CT 92-93, 98-99.) It was also not cumulative because the witness was the only person known to either party to say that a woman had committed the stabbing. (RT 66.) The defense proffered the witness's statement through the testimony of its investigator, given under oath at the hearing on the motion to dismiss. (RT 34.) The court also found that the sheriff's department knew that the witness was under subpoena at the time it turned him over to ICE officials. (RT 67-68; see also RT 44, 65.)

The trial court's ruling that the defense had satisfied *Valenzuela-Bernal*'s materiality standard was correct, uncontested, and supported by the evidence produced at the hearing. Because there was a reasonable likelihood that the witness's testimony could have affected the judgment of the fact-finder, respondent was entitled to sanctions, and the trial court's order dismissing the case must be reinstated. (*Valenzuela-Bernal*, at pp. 873-874.)

## E. Lower California Authority is Split as to Whether the *Valenzuela-Bernal* Materiality Test Also Requires a Showing of Bad Faith

*People v. Mejia, supra*, 57 Cal.App.3d 574, was the leading California case addressing the deportation of witnesses prior to *Valenzuela-Bernal*. In *Mejia*, two illegal aliens arrested with the defendant during a search of his house were turned over to immigration authorities almost immediately after their arrests. (*Id.* at p. 578.) The defense moved to compel production of the two deported witnesses, or to dismiss the case. (*Id.* at p. 579.)

The *Mejia* court found that state action had resulted in the unavailability of the two witnesses and that a "fundamental due process principle . . . is that the prosecution may not deprive an accused of the *opportunity* to present material evidence which might prove his innocence. Even if the prosecution's motives are 'praiseworthy,' they cannot prevail when they '*inevitably* result, intentionally or unintentionally, in depriving the defendant of a fair trial.' [Citation.]" (*Id.* at pp. 579-580, emphasis in original.) The prosecution is not "under principles of basic fairness, privileged to control the proceedings by choosing which material witnesses shall, and which shall not, be available to the accused in presenting his defense." (*Id.* at p. 580.)

The court stated its test for determining whether the unavailable witness was material, and thus whether a constitutional violation had occurred:

> When the evidence discloses the person unavailable either participated in the crime charged, or was a nonparticipating eyewitness to the offense, in a position to perceive what took place from a sufficiently proximate vantage point, such person is a material witness, and the defendant has demonstrated a reasonable possibility he could, if available, give evidence which would exonerate him.

(*People v. Mejia*, *supra*, 57 Cal.App.3d at p. 580.) The *Mejia* court found that the state was responsible for the loss of the witnesses where it had turned over the witnesses to federal authorities with the knowledge that they would be deported, and that the failure to provide the defense the opportunity to interview or subpoena the witnesses denied him a fair trial. (*Id.* at pp. 581-582.)

Following the decision in *Valenzuela-Bernal*, the issue became which test for materiality controlled – *Mejia* or *Valenzuela-Bernal*? *People v. Lopez* (1988) 198 Cal.App.3d 135, found that Proposition 8's "Truth-in-Evidence" provision[8] required the use of a federal materiality standard in both *Mejia* witness deportation cases and *Hitch* demonstrative evidence cases. (*Id.* at p. 144; see also *People v. Hitch* (1974) 12 Cal.3d 641, 648-

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[8] ". . . relevant evidence shall not be excluded in any criminal proceeding . . . ." (Cal. Const., art. I, § 28(d).)

650.) The *Lopez* court reasoned that since the same test for materiality was used in both *Mejia* and *Hitch*, and *Hitch* motions were now governed by the higher standard set forth in *California v. Trombetta* (1984) 467 U.S. 479, so too should *Mejia* witness deportation cases be governed by the test set forth in *Trombetta*.[9] (*People v. Lopez*, *supra*, 198 Cal.App.3d at pp. 144-145.)

*People v. Valencia* (1990) 218 Cal.App.3d 808, 825, rejected the *Lopez* court's analysis and found that the *Valenzuela-Bernal* standard of materiality continued to apply to witness deportation cases. *Valencia* agreed that "Proposition 8 abrogated *Mejia* and its state standard of materiality applicable to deported witnesses." (*Id.* at p. 819.) But it found that the *Lopez* court's desire for an identical materiality test in both deported witness (*Mejia*) and preservation of demonstrative evidence (*Hitch*) contexts "must bow to contrasting opinions by the United States Supreme Court in these two areas." (*Id.* at p. 824.)

*Valencia* rejected the prosecution's request to adopt both the *Trombetta* and *Arizona v. Youngblood*[10] tests for materiality in witness

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[9] Under *Trombetta*, to be constitutionally material, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta*, *supra*, 467 U.S. at p. 489.)

[10] *Youngblood* concerned the loss or destruction of potentially exculpatory evidence, in that case a semen sample on clothing, that could

deportation cases, for several reasons. (*People v. Valencia, supra,* 218 Cal.App.3d at p. 822.) The first was that the decisions in *Trombetta* and *Youngblood* gave no indication that the Supreme Court intended to overrule *Valenzuela-Bernal.* (*Id.* at pp. 820, 822.) Rather, *Trombetta* began its discussion of materiality "with the statement that it was entering an area it had 'never squarely addressed.' Such a statement implies that *Valenzuela-Bernal* dealt with an area entirely separate and apart from the concerns which were dealt with in *Trombetta.*" (*People v. Valencia, supra,* 218 Cal.App.3d at p. 822.)

The *Valencia* court also found that subsequent United States Supreme Court and Ninth Circuit authority failed to show that *Valenzuela-Bernal* had been overruled, and that subsequent California authority had applied *Trombetta* and *Youngblood* only in demonstrative or physical evidence cases. (*People v. Valencia, supra,* 218 Cal.App.3d at pp. 822-823.) This Court had applied the *Valenzuela-Bernal* materiality test, however, in a case challenging prosecutorial intimidation of a defense witness. (*Id.* at p.

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have been subjected to testing. While acknowledging that the destroyed evidence contained a potentially high exculpatory value to the defendant, the court imposed an additional "bad faith" requirement in order to show a constitutional violation in this situation: "We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58.)

823; see *In re Martin* (1987) 44 Cal.3d 1, 30-32.)

The *Valencia* court noted that rather than formulating a definitive constitutional standard for materiality in all loss of evidence cases, *Trombetta* contained "no indication that it proposed to overrule or limit *Valenzuela-Bernal* in any way." (*People v. Valencia*, *supra*, 218 Cal.App.3d at p. 820.) The Supreme Court "clearly demonstrates a 'difference in treatment' for this type of evidence," and once again did not give any indication it intended to overrule *Valenzuela-Bernal* regarding unavailability of material witnesses. (*Ibid.*) The Court's differences in treatment of the different types of evidence addressed in *Valenzuela-Bernal*, *Trombetta* and *Youngblood* implied that the same materiality test was not applicable in all situations. (*Ibid.*)

### F. A Defendant Need Not Show Bad Faith in Order to Establish a Constitutional Violation Under *Valenzuela-Bernal*

The United States Supreme Court has neither explicitly or implicitly overruled *Valenzuela-Bernal.* Rather, it has formulated different tests depending on the type of evidence at issue for determining when a defendant's due process and compulsory process rights have been violated due to the loss of evidence under the prosecution's control. Attempts to have this Court apply a test different from that set forth in *Valenzuela-Bernal* should be rejected as inconsistent with controlling authority.

The Ninth Circuit has stated that "in cases of constitutionally guaranteed access to evidence, wherein the Government loses potentially exculpatory evidence, the Supreme Court has applied a two-pronged test of bad faith and prejudice." (*United States v. Dring* (9th Cir. 1991) 930 F.2d 687, 693.) "Under this two-pronged test, the defendant must make an initial showing that the Government acted in bad faith *and* that this conduct resulted in prejudice to the defendant's case." (*Ibid.* [emphasis in original].)

The *Dring* court's adoption of its two-pronged test in alien witness deportation cases was supported by only a footnote in which it argued that *Youngblood*, *Trombetta*, and *Valenzuela-Bernal* all involved the loss of exculpatory evidence, and thus the question of bad faith was essential to the Court's inquiry. (*United States v. Dring*, *supra*, 930 F.2d at p. 693, fn.7.) The language it relied upon in *Valenzuela-Bernal* was the Court's statement that

> the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. (*Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 872-873.)

*Dring* rejected the defendant's contention that this same language placed the burden of establishing governmental good faith on the part of the prosecution, and went on to find that while *Valenzuela-Bernal* required

"'some showing' of prejudice to be necessary, it neither stated nor implied that a showing of prejudice would have been sufficient to satisfy the good faith prong." (*United States v. Dring*, supra, 930 F.2d at p. 694.)

Other courts have also seized on this mention of "good faith" in *Valenzuela-Bernal* as requiring a showing of bad faith in order to establish a constitutional violation based on the deportation of illegal alien witnesses. (See *United States v. Chaparro-Alcantara* (7th Cir. 2000) 226 F.3d 616, 624; *United States v. Iribe-Perez* (10th Cir. 1997) 129 F.3d 1167, 1173; *United States v. Pena-Gutierrez* (9th Cir. 2000) 222 F.3d 1080, 1085.) But not all federal Courts of Appeal have imposed this requirement. In *United States v. Gonzales* (5th Cir. 2006) 436 F.3d 560, the court found that while all of the federal circuits require a showing of prejudice under the materiality standard set forth in *Valenzuela-Bernal*, courts had implemented that holding in different ways, with only some courts imposing a second "bad faith" prong in order to establish a constitutional violation. (*Id.* at p. 578.) *Gonzalez* declined to decide whether a second "bad-faith" showing was required to establish a constitutional violation in its case in light of its defendant's concession of good faith. (*Id.* at p. 579.)

The language in *Valenzuela-Bernal* does not support the Ninth Circuit's and the prosecution's attempts to engraft an additional "bad faith"

requirement to the materiality showing set forth by the Supreme Court. It is true, as stated by the *Dring* court, that good faith on the part of the prosecution was assumed by the Court in *Valenzuela-Bernal*. ( *United States v. Dring*, *supra*, 930 F.2d at p. 694.) But the Court's isolated mention of good faith does not support a requirement of governmental bad faith in order for a constitutional violation to have occurred.

*Valenzuela-Bernal* focused on the need for a defendant to show the materiality of the lost witness, not on governmental good or bad faith. (*Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 865-871.) The Court ruled that deportation of alien witnesses alone does not establish a violation of the Compulsory Process Clause or the Due Process Clause, but that a violation requires "some showing that the evidence lost would be both material and favorable to the defense." (*Id.* at p. 873.) Where that showing has been made, the constitutional violation is established and sanctions for that violation may be imposed. (*Ibid.*) Good faith on the part of the government, but prejudice (materiality) to the defense establishes the constitutional violation. Bad faith need not be shown.

The Court's failure to impose a bad faith component to the defendant's burden in *Valenzuela-Bernal* is consistent with the Court's Fifth and Sixth Amendment right-to-present-a-defense jurisprudence. After

all, if there had been bad faith on the part of the government, i.e., the government knowingly deported favorable defense witnesses, that would have been a *Brady* violation. (*Brady v. Maryland*, *supra*, 373 U.S. 83.) "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution. (*Id.* at p. 87; see also *United States v. Bagley*, *supra*, 473 U.S. 667, 683.) Prejudice need not be shown in such a situation, since it is inherent in the materiality finding establishing the constitutional violation itself. (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.)

In witness deportation cases, however, the Court recognized the difficulty the defense would have in establishing materiality after having been denied access to the deported witnesses. (*Valenzuela-Bernal*, supra, 458 U.S. at p. 873 [defendant cannot be expected to render detailed description of lost testimony where deportation results in denial of opportunity to interview witnesses to determine precisely what favorable evidence they possess].) Justice O'Connor was concerned that the materiality test of *Valenzuela-Bernal* was inadequate to protect a defendant's right to a fair trial, and would encourage litigation over whether a defendant had established materiality. (*Id.* at p. 875, O'Connor, J.,

concurring.) In her view, the government's need to enforce the immigration laws did not overcome the express terms of the Sixth Amendment, which "requires recognition of the importance, both to the individual defendant and to the integrity of the criminal justice system, of permitting the defendant the opportunity to interview eyewitnesses to the alleged crime. A governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily reconciled with the spirit of the Compulsory Process Clause." (*Id.* at pp. 875-876.)

The Court itself did not require a bad faith showing in order to establish a constitutional violation. It is not for the prosecution or the Ninth Circuit to impose such a requirement where the Court declined the opportunity to do so. "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (*Agostini v. Felton* (1997) 521 U.S. 203, 237; see also at p. 238 [trial court "correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent"]; accord, *Tenet v. Doe* (2005) 544 U.S. 1, 10-11.)

This Court has previously declined to extend United States Supreme

Court authority in advance of rulings by that Court. (See *People v. McGee* (2006) 38 Cal.4th 682, 709 [Court "reluctant to assume" in advance of High Court decision that constitutional right to jury trial applies to prior convictions used to enhance sentences]; *People v. Towne* (2008) 44 Cal.4th 63, 79 [declining to extend right to jury trial to recidivist-related allegations not specifically addressed in *Almendarez-Torres*].) The test for establishing a compulsory process and due process violation based on the deportation of alien witnesses is set forth in *Valenzuela-Bernal*, and a defendant need only satisfy that test to establish a constitutional violation. Respondent urges this Court to decline any invitation to engraft an additional bad faith requirement to the *Valenzuela-Bernal* test in advance of such a ruling by the United States Supreme Court.

### G. Turning Over a Subpoenaed Defense Witness to Immigration Authorities Satisfies the *Valenzuela-Bernal* Test and Violates a Defendant's Rights To Compulsory and Due Process and the Right to Present a Defense

The Compulsory Process and Due Process Clauses of the Fifth, Sixth and Fourteenth Amendments, as well as a defendant's right to present a defense under those same amendments, demand that a defense subpoena of an in-custody witness be honored by the state. This Court has stated that "the prosecution may not deprive an accused of the opportunity to present material evidence which might prove his innocence. Even if the

prosecution's motives are praiseworthy, they cannot prevail when they inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial." (*Bellizzi v. Superior Court* (1974) 12 Cal.3d 33, 36-37 [internal punctuation omitted].)

Justice Stevens noted in his concurrance in *Illinois v. Fisher* (2004) 540 U.S. 544, that he had declined to join the majority in *Youngblood* "because I was convinced then, and remain convinced today, that there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." (*Id.* at p. 549, internal punctuation omitted.) Justice Stevens also noted that following *Youngblood*, several state courts had held, as a matter of state constitutional law, that the loss of critical defense evidence violates due process, even in the absence of bad faith. (*Id.* at p. 549, fn.*; see e.g., *State v. Morales* (1995) 232 Conn. 707, 723 [657 A.2d 585, 593] ["Fairness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in failing to preserve evidence cannot be determinative of whether the criminal defendant received due process of law"].)

The concept of good or bad faith has no role to play when

determining whether a defendant's constitutional rights have been violated based on the government's role in deporting a subpoenaed defense witness. "[W]hen the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." (*Illinois v. Fisher*, supra, 540 U.S. 544, 547, citing *Brady v. Maryland*, *supra*, 373 U.S. 83, and *United States v. Agurs* (1976) 427 U.S. 97.) Where a defendant has identified a material witness and subpoenaed that person to testify, the defense has identified and declared that witness to be both central to the defense and materially exculpatory. The government has no role to play in determining the materiality of a witness where the defense has already deemed that witness necessary and material and taken steps to insure the witness's presence at trial. (*Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 884-885 (dis. opn. of Brennan, J.) [defendant, not government, entitled to decide whether alien witnesses were material to defense]; *People v. Meija*, *supra*, 57 Cal.App.3d at p. 580 [prosecution cannot choose which material witnesses will be made available to the defense].)

### H. The Defense Subpoena, Served on the County Jail, Put the State on Notice of the Witness' Importance to the Defense and Thus Satisfies Any "Bad Faith" Requirement in a *Valenzuela-Bernal* Context

As discussed above, the critical difference between this case and all

of the state and federal cases dealing with the deportation of alien witnesses is the service of the defense subpoena for the witness on the sheriff's department and on the witness himself. None of the cases previously discussed herein have addressed a *Valenzuela-Bernal* claim in the context of a subpoenaed witness. The issuance of the subpoena in this case is critical to the analysis, because the subpoena put the state on notice of the witness's exculpatory value to the defense. Thus, unlike *Valenzuela-Bernal*, or *Trombetta*, or *Youngblood*, this is not a situation where the state had no reason to know that the witness was valuable or necessary to the defense. The issuance of the subpoena gave the state notice of the witness's importance and distinguishes this case from all of the prior case law on deportation of alien witnesses.

*Trombetta* and *Youngblood* addressed the loss of evidence which the state had no reason to believe was valuable to the defense. *Trombetta* addressed whether due process required law enforcement agencies to preserve breath samples of suspected drunk drivers in order for the results of breath-analysis tests to be admissible at trial. (*California v. Trombetta*, *supra*, 467 U.S. at p. 481.) The Court stated that it had never directly addressed "the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants," and noted "the difficulty of

developing rules to deal with evidence destroyed through prosecutorial neglect or oversight." (*Id.* at p. 486.) It also noted the "troubling choices" of dismissal or suppression of probative evidence where evidence has been destroyed in violation of the Constitution. (*Id.* at pp. 486-487.) Where law enforcement had been acting in good faith and in accordance with their normal operating procedures, any duty to preserve evidence had to be "limited to evidence that might be expected to play a significant role in the suspect's defense." (*Id.* at p. 488.) Thus, evidence had to "both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means" before a constitutional violation could be shown. (*Id.* at p. 489.) The breath samples which provided the raw data for the breath-analysis tests could not meet that standard of materiality, and thus there was no due process bar to introducing the results of those tests at trial. (*Id.* at pp. 489-491.)

*Youngblood* concerned the extent to which the state is required to preserve evidence that might be useful to a criminal defendant. (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 52.) In that case, clothing containing semen samples had not been tested or properly preserved, and the potentially exculpatory value of the evidence had been lost by the time of

trial. (*Id.* at p. 54.)

The Court drew a distinction between the failure to disclose material exculpatory evidence, and "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 57.) The Court stated that the differences in treatment were based at least in part on the difficulty of assessing the significance of the lost evidence, and on an unwillingness to place an absolute duty on the police to preserve all material that might be of conceivable evidentiary significance. (*Id.* at pp. 57-58.) Thus, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58.)

In both *Trombetta* and *Youngblood*, the lost evidence at issue did not have any apparent exculpatory value, and was unavailable due to negligence or standard police procedures. Thus the "bad faith" requirements established in those cases can be seen as an appropriate standard where state action deprived the defense access to evidence, but the state actors had no reason to know that the evidence was both valuable to and would be sought after by the defense. As the Court later stated, "the applicability of the bad-

faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between "materially exculpatory" evidence and "potentially useful" evidence." (*Illinois v. Fisher*, *supra*, 540 U.S. at p. 549.) The defense was not entitled to the windfall of a dismissal based on the destruction of potentially-exculpatory evidence where the state had not been put on notice that the defense sought the preservation of the evidence, and no more could be said about the evidence other than it might have proved useful to the defense.

The focus of a *Brady*, *Trombetta* or *Youngblood* inquiry is not the good or bad faith of the prosecution, but the exculpatory nature of the lost evidence. (*Illinois v. Fisher*, *supra*, 540 U.S. at pp. 547, 549.) Where the defense can establish that the prosecution should have realized the exculpatory nature of the evidence, bad faith need not be shown. (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87; *Arizona v. Youngblood*, *supra*, 488 U.S. at pp. 57-58; *Illinois v. Fisher*, *supra*, at p. 547.)

This case is entirely different from the lost evidence cases because the "evidence" here was not potentially-exculpatory physical evidence, but was the exonerating testimony of a live witness. Exculpatory testimony by a witness is qualitatively different than "evidentiary material of which no

more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 57.) The right to present such testimony at trial is enshrined in the Fifth, Sixth and Fourteenth Amendments. (*Washington v. Texas*, *supra*, 388 U.S. at p. 19; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; *Faretta v. California*, *supra*, 422 U.S. at p. 818; *People v. Ortiz*, *supra*, 51 Cal.3d at p. 982.) The critical role of live testimony in a criminal trial, subject to confrontation and cross-examination, has been recognized as a fundamental component of the rights guaranteed by those amendments. (See *Crawford v. Washington* (2004) 541 U.S. 36.) "A defendant's constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf." (*In re Martin*, *supra*, 44 Cal.3d at p. 30.) The fundamental qualitative difference between the exonerating testimony of a live witness and potentially-exculpatory physical evidence counsels against the imposition of any additional bad faith requirement.

In *Martin*, this Court found that a defendant must demonstrate misconduct in order to demonstrate a violation of his compulsory process right based on the intimidation of defense witnesses. (*In re Martin*, *supra*, 44 Cal.3d at pp. 30-31.) But this Court found that a defendant need not

show bad faith or improper motives on the part of the state, only that the agent was engaged in activity unnecessary to the performance of his duties and of such a character as to transform the witness from a willing witness to one who would not testify. (*Id.* at p. 31.) A causal link between that activity, plus a demonstration of the materiality of the witness's testimony as required by *Valenzuela-Bernal*, was necessary in order to establish the constitutional violation. (*Id.* at pp. 31-32.)

In this case, the sheriff department's act of turning over the witness to ICE authorities without prior notice to the defense or the court was the cause of the witness's unavailability. That act, while not misconduct, prevented the defense from utilizing available mechanisms for securing the witness's testimony at trial. Should this Court determine that the defense must establish misconduct or bad faith on the part of the state, in addition to the materiality required by *Valenzuela-Bernal*, the issuance of the subpoena, and its recording in the sheriffs department's computer database, was more than sufficient to satisfy that requirement. The giving of notice via the subpoena, plus the showing of materiality under the *Valenzuela-Bernal* standard, was sufficient to establish any additional "misconduct," "bad faith," or "notice" requirement that this Court may wish to impose. Respondent has demonstrated a denial of his rights to due process and

compulsory process. The trial court's dismissal order must be reinstated.

## CONCLUSION

The trial court was correct in finding that the defense had established a constitutional violation under the materiality standard of *Valenzuela-Bernal*, and thus was entitled to a dismissal of the case. Upon a finding of a constitutional violation based on the deportation of the subpoenaed defense witness, the trial court was free to fashion an appropriate remedy. (*United States v. Valenzuela-Bernal*, *supra*, 458 U.S. at pp. 873-874; *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185.) Based on the uncontested materiality of the witness's testimony to the defense, the trial court determined that nothing short of dismissal was adequate to enforce respondent's constitutional due process and compulsory process rights. The Court of Appeal's reversal of the dismissal order must be overturned, and the trial court's order reinstated.

DATED: September 19, 2008

Respectfully submitted,

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## CERTIFICATE OF WORD COUNT

Counsel for ARMANDO JACINTO hereby certifies that this brief consists of **13,162** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (California Rules of Court, rule 8.520(c)(1).)

Dated: September 19, 2008

STEPHANIE CLARKE

## DECLARATION OF SERVICE BY MAIL

**Re:** ***People v. Armando M. Jacinto*** **Case No. : S164011**

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 730 Harrison Street, Suite 201, San Francisco, CA 94107. On September 19, 2008, I have caused to be served a true copy of the attached **Respondent's Opening Brief on the Merits** on each of the following, by placing same in an envelope(s) addressed as follows:

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Armando Jacinto
(Respondent)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 19, 2008, at San Francisco, California.

Sean Keane
Declarant